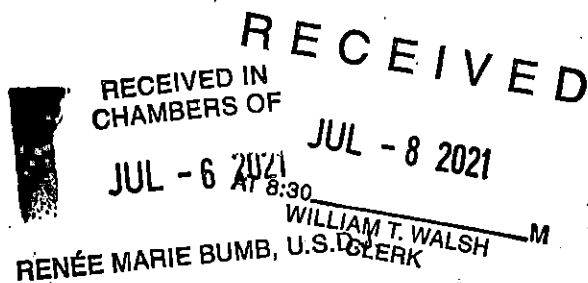


June 28, 2021

Honorable Marie Bumb  
USDC D.NJ  
400 Cooper St.  
Room 1050  
Camden, NJ 08102



Re: Civil No. 20-14093; Hare v. Ortiz

Dear Judge Bumb:

Although I am not a party in the above-referenced matter, the Court's Feb. 4, 2021 ruling affects a matter in which I am a party.<sup>1</sup>

On May 5, 2021, the authors of the First Step Act ("FSA") issued a letter to the Attorney General of the United States. Within, Senators Durbin and Grassley confirmed the text and intent of the FSA contradicts the BOP's position of the application of FSA Time Credits. In its Feb. 4, 2021 ruling, the Court adopted the positions of the BOP which are now infirm. Pursuant to FRE 201(c)(4), the Court may sua sponte take judicial notice of the Senators letter.

A. Eligibility of programs under FSA

In its decision, the Court adopted the BOP's position that "Time credits are earned only when an inmate successfully completes one of the BOP-approved EBRR programs or PAs related to one of the particular needs assigned to that inmate." Id. at 25. And further found that "Petitioner is not entitled to Time Credit for work completed prior to the determination that he had a 'need' for such work under the FSA risk and need assessment system." Id. at 29.

The Senators' letter contradicts the adopted position:

The FSA does not require BOP to limit earned time credits to completion of assigned programming. BOP's inclusion of this limitation in the proposed rule is particularly troublesome because BOP has not developed

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<sup>1</sup> 1:20-cv-211 (ND WV 2020)

an effective needs assessment, as required under the FSA. Under the proposed rule, inmates would not be rewarded for self-identifying needs and voluntarily participating in programming. The proposed rule also, without authority or explanation, prohibits credits for programs completed before January 15, 2020, when the FSA allows for credits based on all programming completed after the statute's enactment on Dec. 21, 2018. (emphasis added)

#### B. Calculation of FSA Time Credits

The FSA requires the award of Time Credits for each "day" of participation in "evidence-based recidivism reduction programming" ("EBRR") or "Productive Activities" ("PA"), 18 U.S.C. 3632(d)(4)(A). Since the term "day", as a unit of measurement, is not defined within the FSA, the BOP interpreted the word to mean an eight-hour period. In adopting the BOP's position as reasonable, the Court specifically rejected the ability for an inmate to receive time credit if he only spent one hour a day participating in an EBRR or PA. See Feb. 4th ruling at 36-37.

The Senators' letter specifically corrects the BOP and the Court's interpretation of the statute:

[the interpretation] undermines the FSA's incentive structure in several respects. First, by defining a day as eight hours of programming the rule greatly restricts the ability to earn credits...While not statutorily defined, the plain meaning of day of participation is every calendar day during which a person successfully participates in an EBRR or PA, with the length of time of participation determined by the program. Instead, the proposed rule defines a day as "one eight-hour period" of a completed EBRR or PA. Using this definition, an inmate who participates in a program one hour a day for eight days would earn just one "day" of participation under the FSA. Given the limited programs offered and the duration and frequency of programs, earning enough time credits to meaningfully reduce prison time would be nearly impossible under this definition.

I ask the Court to take notice of the letter which is available at <https://www.grassley.senate.gov/news-releases/durbin-grassley-press-doj-to-strengthen-first-step-act-rule-on-earned-time-credits-to-incentivize-rehabilitation>

Sincerely,



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